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In the

Supreme Court of the United States

October Term, 1957

No. 569

ISADORE D. BLUMENTHAL,
Petitioner

v.

LEON REINER AND WIFE, BERTHA REINER,
Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

At the risk of being thought frivolous, respondents suggest that the over-riding question in this case is whether the Court will countenance the petitioner's plan to "pay the man his money with a trick."*

Regularizing the case, the only question is:

Should this Court review a decision directing a verdict in a jury trial on the issue of the interpretation of a private contract when

*The quotation is from Hon. Heneage Finch, as Lord Chancellor Nottingham, the "Father of Equity", in Knight vs. Coke, Dec. 1673 (case No. 35 of Nottingham's Chancery cases, Selden Society Publications, Vol. 73, 1954. It was a mortgage redemption case in which the mortgagor claimed credit for profits received by the lessee under his lease and not as mortgagee in possession.).

(1) The contract was in writing, and

(2) There was no conflict in the evidence of the surrounding facts and circumstances, and

(3) The language of the contract, within the framework of the circumstances, permitted only one reasonable inference, and

(4) Counsel for petitioner agreed with counsel for the respondents and with the trial court on the record, that the issue was one of law for the court, and

(5) No federal question is involved?

The petition argues a second question which does not arise in the case at all. It is argued in vacuo. It relates to the legality of the title to the pledged property taken over by respondents under the contract rather than by foreclosure sale under New York law. This question could arise only in an action or upon a counterclaim for *redemption of the pledged property*. This question appears only in petitioner's *briefs*. It does not appear in any *pleading* filed by him, and is consequently ignored both by the District Court and by the Court of Appeals. The debt secured was $108,900, the book value of the pledged stock at the time title passed to respondents under the contract at that value was $55,949.70. No tender of any amount on the debt has ever been made. No allegation as to the market value of the stock appears. On the contrary, petitioner by his third counterclaim affirms the validity of the transfer to respondents at the value of $55,949.70, and seeks recovery of *that amount* as an offset to his notes of $25,000, and prays a judgment over against respondents for the balance, $30,949.70. So the second question stated in the petition, and the argument thereon, are completely irrelevant in this case.

Petitioner has abandoned other defenses made below, dis-

cussed on page 8 of the opinion below (see petition pages 41-42), to-wit:

(1) That the stock was never validly issued, and was therefore "worthless", (2) fraudulent representations, and (3) mismanagement of the corporation by respondents. Since the question of "forfeiture of pledged property" has been lugged into the case only by *argument* without pleading or proof, the question as stated in this brief in opposition is the only question in the case.

CONCISE STATEMENT OF CASE

The opinion of the Court of Appeals by Judge Morris A. Soper (petition p. 35) concisely states the case, and that statement of the facts is adopted by respondents, to avoid useless repetition. Reported 247 F. 2d 461.

ARGUMENT

Upon the written contract and the undisputed facts the Courts (both District Court and Court of Appeals) held untenable (pet. p. 45) the petitioner's position that "immediately upon the execution of the agreement of January 23, 1951, it lay within his power, by the simple device of declaring a default on the promissory notes, not only to wipe out the balance of the debt of $108,900, but also to nullify completely the clause that the stock should be held as collateral security for the payment thereof. Thus instead of owing $25,000 absolutely, and $108,900 contingently secured by the stock as collateral, he would owe only $25,000 on the notes and would become the seller of the stock at the book value of $55,949.70, leaving a balance in his favor of $30,-949.70. Such a result could not possibly have been contemplated by the parties." Accordingly, the District Judge cor-

rected his own initial error in directing a verdict for petitioner by setting that verdict aside and entering judgment n.o.v. for respondents, on motion under Rule 50(b), and the Court of Appeals affirmed.

Petitioner testified that the $25,000 in notes was regarded by the parties "the same as cash" (Appendix to Plaintiffs' Brief in Court of Appeals, page 25, transcript pages 381-382-383). The significance of this admission is that petitioner's principal contention was that the stock was collateral for the $25,000 in notes instead of the otherwise unsecured balance of $108,900. If the $25,000 in notes was regarded as cash, it is extraordinary that petitioner should contend that the stock was collateral for that cash. It is not customary to secure United States currency by collateral.*

Practically all of the evidence was documentary. There was no conflict in any of it that was competent. All the relevant and material facts were admitted by the parties. The only exception to this which is claimed by the petitioner is that the petitioner offered to testify over respondents' objection, as to his, the petitioner's, own understanding of the meaning of the written agreement, which was that if he defaulted in the payment of the notes, respondents would pay him the book value of the stock over and above the notes (Petition for Writ, page 26). Petitioner emphasizes "such understanding was never denied nor refuted by the respondents at the trial" (page 26). The same contention was made before the District Court and before the Court of Appeals. Respondents answered that they had requested and received a stipulation that their objection be regarded as having been made to every question to any witness "as to what the parties intended" (Tran-

* In view of the present market for long term Government Bonds, it is conceivable that someone might ask collateral for them, but not for United States currency.

script page 295). Respondents insisted and both the lower courts held that the evidence of petitioner as to his understanding of the contract was incompetent and, for that reason, the respondents did not testify on that point. The contract spoke for itself. Eliminating that offer of incompetent testimony, there is not a dispute in the record as to any fact. In rejecting the defendant's interpretation of the contract, the Court of Appeals held in its opinion (Petition for Writ, page 44):

> "The situation of the parties at the time of the settlement of January 23, 1951, *as disclosed by the undisputed evidence,* was such that the interpretation of the defendant (petitioner) cannot reasonably be entertained."

Both the District Court and the Court of Appeals decided that the contract was not ambiguous and, therefore, should not have been submitted to the jury for their interpretation, and the Court of Appeals said it agreed "with the position taken not only by the parties but by the defendant himself (petitioner) in the trial below, that the question was to be determined by the Judge" (Petition for Writ, page 47).

Petitioner now takes issue with that finding by the Court of Appeals as to the position he took in the trial, that the issue was one of law for the Court.

The record sustains the Court of Appeals in its finding on this fact (Transcript page 501, lines 1-8 (plaintiffs' reply appendix 32)):

> "Defendant's Counsel: Your Honor looked at the contract, went down the contract and said 'here is what it is, and it's as clear as the noon-day sun'. Now, if that is correct . . . *and we say it is* — then *it is for Your Honor to say what the contract means.* Now, I don't

see that there can be but one question,—that is, I *think the whole case is a matter for peremptory instructions by Your Honor.*" (Emphasis supplied)

Transcript 525, lines 14-19 (plaintiffs' reply appendix 33):

"The Court: Now, let me hear from our friend Mr. Winslow over here. He says he is chomping at the bit.

"Mr. Winslow: If the Court pleases, I was very happy to hear Fred say that he agreed with us that *it is a matter for the Court,* that it is your responsibility and *there is no jury in it. That ought to settle that.*

"After the colloquy between Court and counsel on page 525 just quoted, *there was no dissent from defendant's counsel.*"

Upon the written contract and the undisputed and admitted evidence, excluding from consideration the incompetent testimony of petitioner as to his personal understanding, the District Court directed a verdict interpreting the contract as pledging the stock solely for the otherwise unsecured balance of $108,900 and applying the value of the pledged stock when it was taken over to the satisfaction of that balance as contemplated by the parties and awarding a recovery to the plaintiffs (respondents) on the two notes of $25,000.

Both the District Court and the Court of Appeals ignored petitioner's contention, made only in his briefs, that there was illegal forfeiture of pledged property. Both Courts held that the stock was pledged as security for the balance of $108,900. The stipulated book value of the stock on November 15, 1951, was $55,949.70. Petitioner has never tendered any amount on the balance of $108,900 for which the stock was security and *has never asserted by action or counterclaim any right to redeem the property from the*

pledge. He has not even alleged that the stock was worth more than $108,900 for which it was pledged. Although it was worth $55,949.70, the respondents accepted the stock under the contract in full satisfaction of the balance of $108,900 from which petitioner was relieved by the contract of personal liability.

Both Courts held that no reasonable person could be found by any tribunal, upon the contract and facts in evidence and undisputed, to have intended that under the contract, petitioner was to be relieved of the personal debt of $158,900 by paying $25,000 in cash and $25,000 in notes, with power reserved in petitioner, of his own head, and against the will of respondents, to default in the payment of his $25,000 in notes and thereby cancel his notes for $25,000 and recoup for himself the other $25,000 he paid in cash, and recover of respondents an additional $5,949.70 as partial reimbursement for the original $50,000 he had paid on the stock October 1, 1948. It is petitioner's contention that he is entitled to just that. (See second paragraph on page 29 of Petition for Writ.)

It is this remarkable contention by petitioner which moved respondents to open their brief with the following statement:

> "The over-riding question in this case is whether the Court will countenance the Petitioner's plan to 'pay the man his money with a trick'," a quotation from Lord Nottingham.

Petitioner belabors the contention that he has been denied the Constitutional right of trial by jury because he did not waive a jury trial. *He had a jury trial.* The direction of the verdict when the facts are not in dispute, and only one reasonable inference can be drawn as to the ultimate fact, is *only an incident to trial by jury.* And such disposition of the case is peculiarly appropriate when the party demanding

and getting a jury trial agrees in open court that "the whole case is a matter for peremptory instructions by Your Honor" (Plaintiffs' reply app. 32. Transcript p. 501).

MATTER OR CAUSE WHY THE CAUSE SHOULD NOT BE REVIEWED BY THIS COURT

The case does not fit into any one of the categories set forth in Rule 19 describing the "considerations governing review on certiorari".

The case involves the interpretation of a private contract, which was in writing, upon undisputed evidence of surrounding facts and circumstances, and the application of payments arising out of the proceeds of pledged property. The contract is unique to fit a unique situation. Its like has not been seen before nor is it likely to be seen again. The principles of law are simple and not in dispute. Respondents have cited no authorities on the law, because this case involves nothing but a factual determination under settled rules of law.

Petitioner strains in his petition to raise a Federal question, his right to jury trial under the Constitution, due process of law, etc. However, the case involves only the propriety of a directed verdict where the contract is in writing, the facts are admitted and not in dispute, and counsel on both sides concede that the question involved is one of law for the Court and not for the jury. The directed verdict was warranted by every decision of every Court, District, Court of Appeals and Supreme Court, dealing with the propriety of directing a verdict in the District Court of the United States. No public question is involved, and no conflict of decision between circuits is involved, and the decision is in accord with the accepted and usual course of judicial proceedings.

The trial was unusual in that the petitioner brought in so many irrelevancies that the trial was extended for four days and the record is in several volumes. The Trial Judge was under great strain, for reasons he did not disclose to counsel until after the trial. His sister was on her deathbed, he was driving over 40 miles each night of the four-day trial to see her, and she died the night of the day the trial ended. He was at times misled into making rulings which he later found it necessary to reverse. After he erroneously directed a verdict in favor of the defendant, and the plaintiffs moved under Rule 50(b) for judgment, n.o.v. he had time to further reflect upon the case and realized its simplicity and corrected his own error by setting aside the verdict he had directed in error, and rendered judgment for the plaintiffs. It is noted with some amazement that petitioner in his petition for Writ quotes the rulings and remarks made by the trial judge during the early part of the trial, which that judge later reversed, as authorities in behalf of the petition.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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